

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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### Legend

Trust =

Fund =

State =

u =

v =

w =

x =

y =

z =

zz =

Index =

Dear :

This responds to the request dated August 31, 2007, and supplemental correspondence dated January 11, 2008, submitted by your authorized representative on behalf of Fund. Fund requests that the Internal Revenue Service rule that income and gain arising from the commodities-linked notes described in this letter will constitute qualifying income to Fund under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (the "Code").

## FACTS

Trust, a State statutory trust, is an open-end mutual fund registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (the "1940 Act"). Trust consists of multiple segregated portfolios of assets each of which has elected to be classified as a regulated investment company ("RIC") under section 851 of the Code. Fund is a newly-formed portfolio of the Trust.

Fund intends to invest in commodities-linked notes having the terms and conditions of the following two notes ("Notes"): The first note ("Note") will be issued to Fund at par value of \$u. Its payout formula will be determined with reference to the Index. Its term will be one year and one day. Fund, as holder of the Note, has the right to put the Note to the issuer for redemption at any time before maturity. In addition, if on any day the Index falls to a level that is w% or less of the beginning Index value, the Note will "knockout" and automatically redeem based on the closing Index value of the next day. The repayment obligation upon early redemption, knockout, or at maturity equals the face amount of the Note plus or minus the following adjustment. To calculate the adjustment, the face amount of the Note is multiplied by (A) a leverage factor of x, and by (B) the percentage increase or decrease of the Index over the applicable period. The total is then adjusted to account for a coupon amount calculated at a y rate times the face amount of the Note, for an annual fee amount of z basis points of the notional value (leveraged face amount) of the Note, and for the reversal of an interest factor included in Index.

The second Note will be issued to Fund at par value of \$v. Its payout formula will be determined with reference to the performance of a specified basket of six-month futures contracts with respect to all of the commodities in the Index, with weightings of the different commodities similar to the weightings in the Index. Its term will be for six months. Fund, as holder of the Note, has the right to put the Note to the issuer at the calculated redemption price at any time before maturity. In addition, the repayment obligation upon early redemption, knockout, or at maturity is the greater of 1) zz% of the issue price of the Note and (2) the face amount of the Note less an annual fee amount of z basis points of the notional value (leveraged face amount) of the Note, the reversal of an interest factor included in the Index, plus a coupon amount calculated at a y rate times the face amount of the Note, plus an amount calculated by multiplying (A) the face amount of the Note, by (B) a leverage factor of x, by (C) the percentage increase or

decrease of the value of the specified basket of commodities futures over the applicable period.

Fund makes the following representations with respect to these two Notes:

(1) The issuer of the Notes will receive payment in full of the purchase price of the Notes substantially contemporaneously with the delivery of the Notes;

(2) Fund while holding the Notes will not be required to make any payment to the issuer of the Notes in addition to the purchase price paid for the Notes, whether as margin, settlement payment, or otherwise, during the life of the Notes or at maturity;

(3) The issuer of the Notes is not subject by the terms of the instrument to mark-to-market margining requirements of the Commodities Exchange Act, 7 U.S.C. 2, as amended (CEA); and

(4) The Notes are not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

#### LAW AND ANALYSIS

Section 851(b)(2) of the Code provides that a corporation shall not be considered a RIC for any taxable year unless it meets an income test (the “qualifying income requirement”). Under this test, at least 90 percent of its gross income must be derived from certain enumerated sources. Section 851(b)(2) defines qualifying income, in relevant part, as—

dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the 1940 Act) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to [the RIC’s] business of investing in such stock, securities, or currencies . . . .

Section 2(a)(36) of the 1940 Act defines the term “security” as—

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a

national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(f)(1) of the CEA provides that the CEA is not applicable to a hybrid instrument that is predominantly a security. Section 2(f)(2) of the CEA provides that a hybrid instrument shall be considered to be predominantly a security if—

(A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with the delivery of the hybrid instrument;

(B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;

(C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

(D) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Section 2(f)(3) of the CEA provides, in part, that for purposes of section 2(f)(2)(C) of the CEA, mark-to market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

CONCLUSION

Based on the facts as represented, we rule that income and gain arising from the Notes constitute qualifying income to Fund under section 851(b)(2) of the Code.

Sincerely,

Susan Thompson Baker  
Susan Thompson Baker  
Assistant to the Branch Chief, Branch 2  
Office of the Associate Chief Counsel  
(Financial Institutions & Products)